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POLICIES OF APARTHEID OF THE
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SECURITY COUNCIL
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Letter dated 29 July 1993 from the Permanent Representative of South Africa to the United Nations addressed to the Secretary-General

I have the honour to refer to my letter of 12 March 1993 (A/48/114-S/25406) regarding the Multi-Party Negotiating Process (MPNP) under way in South Africa. The MPNP has, since the resumption of negotiations in April 1993, achieved remarkable progress in mapping out the constitutional future of South Africa, including adopting 27 April 1994 as the date for South Africa's first universal franchise election. The fact that the MPNP has comprised 26 political parties/groups, inclusive of the far right and far left of the political spectrum, renders the progress particularly significant.

Intense deliberations of the MPNP's Negotiating Council culminated in a session of the Multi-Party Forum (the effective plenary of the MPNP) on 2 July 1993, at which various resolutions that had been adopted by the Negotiating Council, including 27 constitutional principles, were ratified. These principles constitute the surety that South Africa's future constitution will provide for a democratic government answerable to the highest level of internationally accepted standards. A State with strong central government, but with firmly entrenched provisions to accommodate regional diversity, has been agreed upon. To support this new democratic dispensation, a Bill of Fundamental Human Rights will be entrenched in the constitution.

The constitutional principles (see annex) will be binding on the transitional constitution as well as on the final constitution. The detailed provisions of the latter will be enacted by the Transitional Parliament to be elected on 27 April 1994, acting as a Constituent Assembly. The principles, allowing both for strong national and strong regional government, will be justiciable.

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* A/48/150.

The levelling of the political playing-field, which is an essential prerequisite to the elections, will be ensured by a Transitional Executive Council. The Council, together with its six sub-councils, will, at the latest, commence its activities shortly after the passing of enabling legislation by Parliament during the short parliamentary session which is scheduled from 13 September to 8 October 1993. The Transitional Constitution, in terms of which the Transitional Government to be empowered by the elections will govern, will be legislated at the same time.

The Transitional Executive Council will not replace current first-tier government structures but will operate concurrently with them. It will also oversee the work of an Independent Electoral Commission, an Independent Media Commission and an Independent Broadcasting Authority, during the run-up to the election.

I should be grateful if this letter and its annex could be circulated as a document of the General Assembly, under item 38 of the provisional agenda, and of the Security Council.

(Signed) V. R. W. STEWARD
Ambassador
Permanent Representative

ANNEX

Multi-Party Negotiating Process in South Africa from 1 April to 2 July 1993: A Summary

INTRODUCTION

The Negotiating Forum at its meeting held on 1 April 1993 mandated the (subordinate) Negotiating Council to consider and report progress on a number of issues. In compliance with this mandate, the Negotiating Council held 20 meetings between 1 April and 2 July 1993 to consider and report on inter alia, constitutional issues, including the process leading to a new democratic constitution for South Africa, structures to be erected and procedures to be adopted in order to level the playing field and to supervise an election for a Parliament/ Constituent Assembly.

The following constitutional issues were assigned to various Technical Committees:

- The Form of State and Constitutional Principles
- The Constitution Making Body/Constituent Assembly
- The Transitional/Interim Constitution
- Transitional Regional and Local Government
- Fundamental Human Rights during the Transition
- The Transitional Executive Council and its Sub-Councils,
- An Independent Electoral Commission and Independent Media Commission
- The future of the TBVC (Transkei/Bophuthatswana/Venda/Ciskei) States
- Self-determination

A. RECOMMENDATIONS OF THE NEGOTIATING COUNCIL ADOPTED BY THE NEGOTIATING FORUM

A.1 CONSTITUTIONAL PRINCIPLES

(The numbering below follows the Report of the Negotiating Council to the Negotiating Forum.)

The Constitutional Principles agreed upon by the Negotiating Forum shall be binding on the Constitution - Making Body; the justiciability of these Constitutional Principles shall be ensured by a Constitutional Court/Tribunal.

2.1 The Constitution of South Africa shall provide for the establishment of one sovereign state with a democratic system of government, a common South African

citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

2.2 The Constitution shall be the supreme law of the land, shall be binding on all organs of government, shall prohibit racial, gender and all other forms of discrimination and promote racial and gender equality and national unity.

2.3 There shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness.

2.4 The judiciary shall be competent, independent and impartial and shall have the power and jurisdiction to safeguard and enforce the constitution and all fundamental rights.

2.5 There shall be representative government embracing multi-party democracy, regular elections, universal adult suffrage, a common voters roll, and in general, proportional representation.

2.6 Provision shall be made for freedom of information so that there can be open and accountable administration at all levels of government.

2.7 Formal legislative procedures shall be adhered to by legislative organs at all levels of government.

2.8 The diversity of language and culture shall be acknowledged and protected, and conditions for their promotion shall be encouraged.

2.9 Collective rights of self-determination in forming, joining and maintaining organs of civil society, including linguistic, cultural and religious associations, shall, on the basis of non-discrimination and free association, be recognized and protected.

2.10 All shall enjoy universally accepted fundamental rights, freedoms and civil liberties, protected by entrenched and justiciable provisions in the constitution.

2.11 The legal system shall ensure the equality of all before the law and an equitable legal process. The principle of equality before the law includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

2.12 The institution, status and role of Traditional Leadership, according to indigenous law, shall be recognized and protected in the Constitution. Indigenous law, like common law, shall be recognized and applied by the courts subject to the provisions of the fundamental rights contained in the Constitution and to legislation dealing specifically therewith.

2.13 Provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy.

2.14 Amendments to the constitution shall require special procedures involving specified majorities.

2.15 Government shall be structured at national, State/Provincial/Regional (SPR) and local levels.

2.16 At each level of government there shall be democratic representation. This principle shall not derogate from the provisions of Principle 2.12.

2.17 Each level of government shall have appropriate and adequate legislative and executive powers and functions that will enable each level to function effectively. The allocation of powers between different levels of government shall be made on a basis which is conducive to financial viability at each level of government and to effective public administration, and which promotes national unity, legitimate regional autonomy and cultural diversity.

2.18 The powers and functions of national and SPR governments shall be defined in the Constitution. Amendments to the Constitution which alter the powers, boundaries, functions or institutions of SPR's shall in addition to any other procedures specified in the Constitution for constitutional amendments, also require the approval of a specified majority of the legislatures of the SPR's, alternatively, if there is such a chamber, a specified majority of a chamber of parliament composed of regional representatives, and if the amendment concerns specific SPR's only, the approval of the legislatures of such SPR's will also be needed. **(This principle has not yet been adopted by the Negotiating Council. It was, therefore, agreed by the Negotiating Forum that the Technical Committee explore the suggested amendments and report back to the Negotiating Council).**

2.19 A framework for local government powers, duties, functions and structures, shall be set out in the Constitution. The comprehensive powers, duties,

functions and other features of local government shall be set out in parliamentary statutes and/or SPR legislation.

2.20 The powers and functions of the national and SPR levels of government shall include exclusive and concurrent powers as well as the power to perform functions for other levels of government on an agency or delegation basis.

2.21 National and SPR governments shall have fiscal powers and functions which will be defined in the Constitution. The framework for local government referred to in paragraph 2.19 shall make provision for appropriate fiscal powers and functions for different categories of local government.

2.22 Each level of government shall have a constitutional right to an equitable share of revenue collected nationally so as to ensure that SPR's and local governments are able to provide basic services and execute the functions allocated to them in the Constitution.

2.23 A Financial and Fiscal Commission, representing inter alia each of the SPR's, shall recommend equitable fiscal and financial allocations to the SPR governments from revenue collected nationally, after taking into account the national interest, disparities within the SPR's as well as the population and developmental needs, administrative responsibilities and other legitimate interests of each of the SPR's.

2.24 The following criteria shall be applied in the allocation of powers to the national government and the SPR governments:

SPR GOVERNMENT

General

2.24.1 The level at which there is most control over the quality and delivery of services, should be the level responsible and accountable for the execution of the programme or the delivery of the services.
(This criterium has not yet been accepted by the Negotiating Council. The Negotiating Forum agreed that the Technical Committee explore suggested amendments and report back to the Negotiating Council.)

2.24.2 The national government shall not exercise its powers (exclusive or concurrent) so as to encroach

upon the geographical, functional or institutional integrity of the SPR's.

2.24.3 Where it is necessary for the maintenance of essential national standards, the maintenance of economic unity, the maintenance of national security or the prevention of unreasonable action taken by one SPR which is prejudicial to the interests of another SPR or the country as a whole, the constitution shall empower the national government to intervene through legislation or such other steps as may be defined in the constitution.

2.24.4 The essential principles of the constitution including the fundamental rights contained therein shall apply to all organs of the state at all levels of government.

National Government

2.24.5 Where there is necessity for South Africa to speak with one voice, or to act as a single entity - in particular in relation to other states - powers should be allocated to the national government.

2.24.6 Where uniformity across the nation is required for a particular function, then legislative power over that function should be allocated predominantly, if not wholly, to the national government.

2.24.7 Where minimum standards across the nation are required for the delivery of public services, the power to set such standards should be allocated to the national government.

2.24.8 The determination of national economic policies, and the power to promote inter-SPR commerce and protect the common market in respect of the mobility of goods, services, capital and labour, should be allocated to the national government.

SPR Government

2.24.9 SPR governments shall have such powers, either exclusively or concurrently with the national government, as may be necessary, inter alia, for the purpose of regional planning and development, and the delivery of services and aspects of health, welfare and education, within their boundaries. **(It was agreed that the Technical Committee reformulate this principle).**

Concurrent Powers

2.24.10 Where mutual co-operation is essential or desirable or where it is required to guarantee equality of opportunity or access to a government service, the powers should be allocated concurrently to the national government and the SPR governments.

2.24.11 In the event of a dispute concerning the legislative powers allocated by the Constitution concurrently to the national and SPR governments which cannot be resolved by a court on a construction of the Constitution, precedence shall be given to the legislative powers of the national government.

Residual Powers

2.24.12 The Constitution shall specify how powers which are not specifically allocated in the constitution to the national government or to an SPR government, shall be dealt with as necessary ancillary powers pertaining to the powers and functions allocated either to the national or SPR governments.

2.25 Notwithstanding the provision of any other clause, the right of employers and employees to join and form employer organisations and trade unions and to engage in collective bargaining shall be recognized and protected.

2.26 The independence and impartiality of a Commission for Administration, a Reserve Bank, an Auditor General and an Ombudsman shall be provided for and safeguarded by the Constitution in the interests of the maintenance of effective public finance and administration and a high standard of professional ethics in the Civil Service.

(It was suggested that the concept of the Attorney General be included within the principle. The Negotiating Forum agreed and it was therefore referred back to the Technical Committee for this purpose).

2.27 Every member of the security forces (police, military and intelligence) and the security forces as a whole shall be required to perform his or her duties and functions and exercise his or her powers in the national interest and shall be prohibited from furthering or prejudicing party political interest."

UNQUOTE

The following principles were not adopted and must still be considered by the Negotiating Council:

> **"Nothing in the above Constitutional Principles shall prevent an SPR from democratically approving its own Constitution, which shall not be in conflict with the National Constitution." (This principle will be pursued in bilateral meetings within the Negotiating Council.)**
>
> **"The right of self-determination of peoples, which allows them to determine their own political status through legislative and executive powers in the form of territorial independence and autonomy, is acknowledged" (This is the Conservative Party's draft principle on self determination. It was agreed that the Negotiating Council refer this whole issue back to the Technical Committee).**

A.2 STATES/PROVINCES/REGIONS (SPR's)

The Negotiating Forum confirmed the establishment of a Commission on the Delimitation/Demarcation of SPR's, which shall report to the Negotiating Council in due course.

The Constitutional Principles as stated above relating to SPR's were **adopted by the Negotiating Forum** as being binding on the Constitution-Making Body.

The Negotiating Forum agreed that the powers, functions, and structures of regions for the transition period shall be incorporated in the Constitution for the transition period.

The Negotiating Forum agreed that the election of Regional Legislatures and the establishment of Regional Governments in the transitional period shall be provided for in the Constitution for the transitional period.

A.3 CONSTITUTION FOR THE TRANSITION PERIOD AND THE CONSTITUTION-MAKING BODY

The Negotiating Forum agreed that the Technical Committee on Constitutional Issues shall draft a constitution for the transition period which shall make provision for:

- The election according to a system of proportional representation of a Constitution-Making Body,

legislature and national government for the transitional phase which will include a National and Regional component. With regard to constitution making, this constitution shall provide for deadlock breaking and special majorities by which decisions will be taken;

- The election of regional legislatures and the establishment of regional governments in the transition;

- The powers, functions and structures of regions for the transitional period;

- Fundamental human rights on a justiciable basis during the transitional period;

- A Constitutional Court/Tribunal to ensure the justiciability of the constitutional principles, of the fundamental rights and of the constitution itself.

A.4 FUNDAMENTAL HUMAN RIGHTS DURING THE TRANSITION

The Negotiating Forum noted that a final report on Fundamental Human Rights during the Transition will be presented to the Negotiating Council in due course.

B. SECTION TWO - RECOMMENDATIONS FOR LEVELLING THE PLAYING FIELD AND PROMOTING CONDITIONS CONDUCIVE TO THE HOLDING OF FREE AND FAIR ELECTIONS

B.1 INDEPENDENT ELECTORAL COMMISSION (IEC)

The Negotiating Forum agreed in principle that an Independent Electoral Commission be established, whose object shall be to administer and conduct a free and fair democratic electoral process of the new Parliament/Constituent Assembly/SPR Governments, including responsibility for any other matter connected therewith.

The Negotiating Forum noted that a Draft Bill for the establishment of the Independent Electoral Commission, as well as a draft Electoral Act is being prepared by the Technical Committee.

B.2 INDEPENDENT MEDIA COMMISSION (IMC) AND INDEPENDENT BROADCASTING AUTHORITY (IBA)

The Negotiating Forum agreed in principle that an Independent Media Commission be established with the following objectives:

- To ensure equitable treatment of political parties by broadcasting services;

- To ensure that State financed publications and State-information services are not used to advance the interest of any political party;

So as to contribute towards the promotion and creation of a climate favourable to free political participation and a free and fair election.

The Negotiating Forum noted that a Draft Bill for the establishment of the Independent Media Commission and for the Independent Broadcasting Authority has been prepared by the Technical Committee for consideration by the Negotiating Council in due course.

B.3 AMENDMENT OR REPEAL OF LEGISLATION IMPEDING FREE POLITICAL ACTIVITY AND DISCRIMINATORY LEGISLATION

The Negotiating Forum agreed in principle that a "Higher Code" should be established to deal with this legislation. The Technical Committee will present a final report to the Negotiating Council in due course. **The Negotiating Forum** ratified this instruction. (The National Party indicated that it wants clarity before taking a final decision on the "Higher Code".)

B.4 TRANSITIONAL EXECUTIVE COUNCIL

The Negotiating Forum agreed to:

Instruct the Technical Committee on the Transitional Executive Council and its Sub-Councils to begin with the drafting of legislation on the basis of the framework presented in paragraph 1 of their First Report, thereby putting into one document all the provisions and present the Negotiating Council with draft legislation.

The establishment of a Transitional Executive Council in principle, in line with the Resolution on Steps to be Taken for the Purposes of Establishing a New Constitutional Order as adopted by the Negotiating Council on 30 June 1993. (See Appendix A for the text of this Resolution.) This is an in-principle decision and the details of the

draft legislation will still have to be discussed.

C. RESOLUTION ON AN ELECTION DATE

QUOTE

RESOLUTION BY THE NEGOTIATING FORUM ON THE CONTINUATION OF THE NEGOTIATING PROCESS

This meeting of the Negotiating Forum held on Friday 2 July, 1993;

Having noted the adoption by this Forum of the reports and recommendations tabled by the Negotiating Council at this meeting;

Hereby:

1. Confirms the date for the election as the 27 April 1994;

2. Instructs the Negotiating Council to:

2.1 Take note of the fact that a constitution for the transition period will have to be adopted and to identify the other agreements to be reached as well as the implementation steps to be taken before the election can take place;

2.2 Prepare time scales for the agreements and the implementation steps to be undertaken for the election to take place;

2.3 Determine whether the election can be held on an earlier date than the 27 April 1994 if a final settlement on the substantive issues should be reached earlier; and

2.4 Determine the precise number of days over which the elections will be held in co-operation with the Independent Electoral Commission.

UNQUOTE

APPENDIX A

RESOLUTION ON STEPS TO BE TAKEN FOR THE PURPOSES OF ESTABLISHING A NEW CONSTITUTIONAL ORDER

1. The Negotiating Council agrees on the following steps to be taken for the purposes of establishing a new consitutional order:

1.1 The MPNP shall adopt the constitutional principles including the principles of Regional Government providing for both strong Regional Government and strong National Government;

1.2 The Constitutional Principles shall be binding on the Constitution-Making Body and shall be justiciable by a constitutional court/tribunal;

1.3 The Commission on Delimitation/Demarcation appointed by the MPNP will make recommendations to the MPNP on regional boundaries for the purposes of elections and Regional Government for the transitional phase;

1.4 The MPNP shall agree on legislation to make provision for the following structures for the purpose of levelling the playing field and promoting conditions conducive to the holding of free and fair elections:

1.4.1 A Transitional Executive Council;

1.4.2 An Independent Electoral Commission;

1.4.3 An Independent Media Commission and an Independent Broadcasting Authority;

1.5 The MPNP shall agree on details of discriminatory legislation to be repealed;

1.6 The MPNP shall agree on a constitution for the transitional period;

2. The Negotiating Council accordingly requests the Technical Committee on Constitutional Issues to draft a Constitution for the transition which shall make provision for:

2.1 The election according to a system of proportional representation of a Constitution-Making Body, legislature and national government for the

transitional phase which will include a National and Regional component. With regard to constitution making, this constitution shall provide for deadlock breaking and special majorities by which decisions will be taken;

2.2 The election of regional legislatures and the establishment of regional governments in the transition;

2.3 The powers, functions and structures of regions for the transitional period;

2.4 Fundamental human rights on a justiciable basis during the transitional period;

2.5 A Constitutional Court/Tribunal to ensure the justiciable of the constitutional principles, of the fundamental rights and of the constitution itself.

3. Participants are given until the 12th of July 1993, to make further inputs to the Technical Committee (on Constitutional Issues) with regard to the above draft constitution for the transition.

4. This is agreed against the background of paragraph 6 of the Explanatory Memorandum adopted by the Negotiating Council of 30 April 1993.